

No. 15553

United States
Court of Appeals
for the Ninth Circuit

FARMERS' MUTUAL INSURANCE CO.,
Appellant,
vs.
JOHN L. ROE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

AUG 21 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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CARL ROBERT WELLS,

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For Appellee.

In the District Court of the United States
for the District of Oregon

Civ. No. 8470

JOHN L. ROE,

Plaintiff,

vs.

FARMERS' MUTUAL INSURANCE CO.,

Defendant.

COMPLAINT

Comes now plaintiff and for cause of action
against defendant alleges:

I.

Plaintiff is a citizen of the State of Oregon and
defendant is a corporation incorporated under the
laws of the State of Washington. The matter in con-
troversy exceeds, exclusive of interest and costs, the
sum of \$3,000.00.

II.

On July 30, 1954, judgment was entered in the
Circuit Court of the State of Oregon for the County
of Multnomah in favor of plaintiff and against a
certain Kenneth Pedro in the sum of \$3,500.00, plus
his costs and disbursements taxed at \$43.05, upon a
cause of action for damages for personal injuries to
plaintiff arising out of the use and operation of an
automobile by said Kenneth Pedro, which judgment
remains unsatisfied and more than 30 days have
elapsed from the date of entry of said judgment.

III.

Defendant is in the business of writing automobile public liability insurance policies, and at all times material herein, defendant held such a policy in effect covering said Kenneth Pedro by which defendant agreed to indemnify him against such liability, not to exceed \$10,000.00.

IV.

Despite demand, defendant has failed, neglected and refused to pay said judgment, or any part thereof, and there is now due and owing thereon the sum of \$3,500.00, together with interest at the rate of 6% per annum from July 30, 1954, until paid, and the sum of \$43.05, together with interest at the rate of 6% per annum from July 30, 1954, until paid.

V.

More than six months have expired from date said judgment has remained unsatisfied, and plaintiff is entitled to recover his reasonable attorney's fee herein, in the sum of \$1,500.00.

Wherefore, plaintiff prays for judgment against defendant in the sum of \$3,500.00, together with interest thereon at the rate of 6% per annum from July 30, 1954, until paid, and for the sum of \$43.05 together with interest thereon at the rate of 6% per annum from July 30, 1954, until paid, and for the further sum of \$1,500.00, his reasonable attorney's

fee, and for his costs and disbursements incurred herein.

McCORMICK & WELLS,
/s/ By DONALD B. McCORMICK,
Attorneys for Plaintiff.

Notice of Demand for Jury Trial

Plaintiff hereby demands jury trial of all issues triable to a jury.

/s/ DONALD B. McCORMICK.

[Endorsed]: Filed Feb. 14, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter came on for pre-trial conference on the 21st day of May, 1956, before the undersigned Judge of the above-entitled Court. Plaintiff appeared by Carl Robert Wells, of his attorneys, and defendant appeared by Duane Vergeer, of its attorneys. The parties, with the approval of the Court, agreed upon the following:

Statement of Facts

1. Plaintiff is a citizen of the State of Oregon and defendant is a corporation incorporated under the laws of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.
2. On July 30, 1954, judgment was entered in the

Circuit Court of the State of Oregon for the County of Multnomah in favor of plaintiff and against a certain Kenneth Pedro in the sum of \$3,500.00, plus his costs and disbursements taxes at \$43.05, upon a cause of action for damages for personal injuries to plaintiff arising out of the use and operation of an automobile by said Kenneth Pedro, which judgment remains unsatisfied and more than 30 days have elapsed from the date of entry of said judgment.

3. Defendant is in the business of writing automobile public liability insurance policies, and at all times material herein, defendant held such a policy in effect covering said Kenneth Pedro by which defendant agreed to indemnify him against such liability, not to exceed \$10,000.00.

4. Said policy contained a provision, as follows: "If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

5. Despite demand, defendant has failed, neglected and refused to pay said judgment, or any part thereof, and there is now due and owing thereon the sum of \$3,500.00, together with interest at the rate of 6% per annum from July 30, 1954, until paid, and the sum of \$43.05, together with interest at the rate of 6% per annum from July 30, 1954, until paid.

6. Personal service was had on Kenneth Pedro of the complaint and summons in plaintiff's action

against him, referred to in paragraph 2 hereinabove, in Multnomah County, Oregon, on or about May 20, 1954, by delivery to him by the Sheriff of said county and state of a copy of said summons and complaint.

7. Pre-Trial Exhibit A which is attached hereto is the policy of insurance the defendant had issued to Kenneth Pedro and no further identification of the same is necessary, and that the same may be received into evidence in this matter.

Plaintiff's Contentions of Fact

1. Defendant had actual notice and knowledge of the accident out of which plaintiff's claim against Kenneth Pedro arose, within a reasonable time after the occurrence of the accident.

2. Defendant had actual notice and knowledge of the existence of plaintiff's lawsuit against Kenneth Pedro within a reasonable time after said lawsuit was commenced and prior to the time of judgment.

3. Defendant was not substantially prejudiced by failure, if any, on the part of Kenneth Pedro to forward to it a copy of the complaint and summons in plaintiff's case against him.

4. Defendant was not substantially prejudiced by failure, if any, on the part of Kenneth Pedro to advise the defendant or keep it advised of his presence or address.

Defendant denies the above contentions.

Defendant's Contentions of Fact

1. That suit papers including the summons and complaint referred to in paragraph 6 of the agreed facts were never forwarded by Kenneth Pedro to the defendant.

2. That subsequent to the commencement of the action by the present plaintiff against Kenneth Pedro, the defendant was not advised by Kenneth Pedro of his address and Kenneth Pedro failed to keep the defendant advised of his presence or subsequent address.

3. That no action against this defendant lies until or unless every condition precedent to the bringing thereof is met.

4. That the insurance above referred to is and was in all material respects identical with the policy form marked Pre-Trial Exhibit A, a copy which is attached hereto and by reference made a part hereof as though the same was fully set forth herein at this particular point.

5. That the defendant never received notice of the pendency of the action brought by Roe against Pedro and was not given an opportunity to defend the same or to compromise or settle said claim.

Plaintiff denies the above contentions.

Plaintiff's Contentions of Law

1. The burden of proving that the insured failed to forward suit papers to the insurer in accordance with a policy provision requiring him to do so

which is alleged as an affirmative defense in defendant's answer herein, is upon the defendant.

2. Where the insurer has actual notice and an opportunity to make an investigation and defend the suit, a failure on the part of the insured to forward to the insurer copies of the suit papers will not prevent a recovery by a third party against the insurer on a judgment subsequently obtained against the insured.

3. A violation by the insured of a policy condition to forward suit papers is not a defense to the insurer against an action by a third party on a judgment obtained against the insured, unless the insurer has been substantially prejudiced by the failure on the part of the insured to forward the suit papers.

4. A violation by the insured of a policy condition to forward suit papers is not a defense to the insurer against an action by a third party on a judgment obtained against the insured.

5. The burden of proving that the insured failed to cooperate with the insurer is upon the defendant.

6. Failure of the insured to advise the insurer and keep it advised as to his presence or address is not a defense to the insurer against an action by a third party on a judgment obtained against the insured, unless the insurer has been substantially prejudiced by the failure on the part of the insured to advise the insurer.

7. Failure of the insured to advise the insurer and keep it advised as to his presence or address is not a defense to the insurer against an action by a third party on a judgment obtained against the insured.

Defendant's Contentions of Law

1. Failure to forward copies of process, including copies of Summons and Complaint was a failure to perform a condition precedent under the terms of the policy herein, and that as result thereof no coverage was applicable to the accident in question and/or the action and judgment resulting therefrom.

2. The burden of proof in the present case is upon the plaintiff to show that Kenneth Pedro performed all the conditions precedent to make coverage effective.

3. No prejudice need be shown when the failure to forward the suit papers, including complaint and summons, is established.

4. Failure to forward suit papers including summons and complaint relieves the insurer of any obligation to any judgment resulting against the assured.

5. Failure on the part of the assured to cooperate acts to relieve the insurer of all liability to pay any judgment resulting against the assured.

Issues of Fact

1. Whether Kenneth Pedro failed to forward

the defendant the demand, notice, summons or other process received by him or his representative in connection with plaintiff's action against him.

2. In addition to the alleged failure on the part of Kenneth Pedro to forward the process including summons and complaint to the defendant, was there any other failure to cooperate in his failure to keep the defendant advised of his present address.

Issues of Law

1. Who has the burden of proving the compliance or non-compliance of the insured with a policy condition requiring him immediately to forward to the insurer every demand, notice, summons or other process received to him or his representative if claim is made or suit is brought against him.

2. Is it necessary to the defense by the insurer against an action by a third party on a judgment obtained against the insurer which defense is based upon the alleged failure of the insured to forward suit papers, that the insurer be prejudiced by such failure of the insured to forward said papers.

3. Does the failure on the part of an insured under the terms of the policy herein, to forward copies of process, including summons and complaint, relieve the defendant insurer of the duty to defend and/or pay any judgment arising out of an action.

4. Was there a violation of cooperation by the defendant's insured herein and did the failure to

cooperate on the part of Kenneth Pedro absolve the defendant of any duty to defend and/or pay any judgments arising against the said Kenneth Pedro.

5. Who has the burden of proving its compliance or non-compliance by the insured of a policy condition requiring the insured to cooperate with the insurer.

6. Is it necessary to the defense by the insurer against an action by a third party on a judgment obtained against the insured which defense is based upon the alleged failure of the insured to advise the insurer and keep it advised of his presence or address, that the insured be prejudiced by the failure of the insured so to advise the insurer.

Stipulation

In the event that plaintiff becomes entitled to recover his reasonable attorney's fee herein, the Court may fix the amount thereof.

Jury Trial

Timely demand for a jury trial of all issues triable to a jury has been made by plaintiff.

The parties hereto having agreed to the foregoing pre-trial order and the Court being fully advised in the premises; now, therefore,

It Is Hereby Ordered that the foregoing Pre Trial Order be not amended except by consent of both parties or to prevent manifest injustice; and

It is Further Ordered that this Pre-Trial Order supersedes all pleadings herein; and

It Is Further Ordered that upon trial of the within cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted.

Dated at Portland, Oregon, this 18th day of January, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ CARL ROBERT WELLS,
Attorney for Plaintiff.

/s/ DUANE VERGEER,
Attorney for Defendant.

[Endorsed]: Filed Jan. 18, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly impaneled and sworn to try the above entitled cause find our verdict in favor of plaintiff and against defendant.

Dated at Portland, Oregon, this 21st day of January, 1957.

/s/ DELBERT O. SMITH,
Foreman.

[Endorsed]: Filed Jan. 21, 1957.

In the District Court of the United States
for the District of Oregon

Civ. No. 8470

JOHN L. ROE,

Plaintiff,

vs.

FARMERS' MUTUAL INSURANCE CO.,

Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial in the above-entitled Court and before jury on the 18th day of January, 1957; the plaintiff appearing in person and by Carl Robert Wells of his attorneys, and the defendant appearing in person and by Duane Vergeer of its attorneys; a jury having been duly empaneled and sworn to try the above-entitled cause; opening statements of

counsel having been made; witnesses having been sworn and testified and evidence having been adduced by both sides; both sides having rested and closing arguments having been made; and thereafter the Court having instructed the jury as to the law; and

Thereafter, and on the 21st day of January, 1957, the jury having returned its verdict, which in words and figures was and is substantially as follows, to wit:

"We, the Jury, duly impaneled and sworn to try the above entitled cause find our verdict in favor of plaintiff and against defendant.

"Dated at Portland, Oregon, this 21st day of January, 1957.

/s/ DELBERT O. SMITH,
Foreman."

It appearing that a trial of the above-entitled cause was duly and regularly had before a jury, and that the jury found their verdict in favor of plaintiff and against defendant, and that judgment should be entered herein in accordance with said verdict and in accordance with the Pre-Trial Order previously made and entered herein; now, therefore

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have judgment against defendant and recover of and from defendant the sum of \$3,543.05, together with interest thereon at the rate of 6% per annum from July 30, 1954, until paid and the further sum of \$500, plaintiff's reasonable attorney's fee herein as fixed by the Court, and for

plaintiff's costs and disbursements incurred herein, taxed at \$30.38, and that execution issue for all of the above.

Dated at Portland, Oregon, this 21st day of January, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Jan. 23, 1957.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

This matter having come on upon motion of defendant for Judgment Notwithstanding the Verdict, and the Court having heard the arguments of counsel and counsel for each side having submitted to the Court an outline of their arguments and authorities, and the Court being fully advised in the premises and of the opinion that defendant's said motion should be denied; now, therefore,

It Is Hereby Adjudged that defendant's Motion for Judgment Notwithstanding Verdict be and the same hereby is denied.

Dated this 11th day of March, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Mar. 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To, the Clerk of the District Court of the United States for the District of Oregon; John L. Roe, the plaintiff herein; and Carl Robert Wells, his attorney, Greetings:

You and each of you will please take notice that the defendant in the above entitled matter does hereby give notice of appeal to The United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein in favor of the plaintiff and against the defendant.

Dated this 2nd day of April, 1957.

VERGEER & SAMUELS,
/s/ By DUANE VERGEER,
Of Attorneys for Defendant.

Affidavit of Service Attached.

[Endorsed]: Filed April 3, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH THE APPELLANT-DEFENDANT WILL RELY UPON APPEAL

Comes now the Appellant-Defendant, and presents the following as a Statement of Points upon which it intends to rely in its appeal of the above entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

That the complaint and the pre-trial order failed to state a cause of action against the defendant or any claim upon which relief could be predicated.

II.

The evidence showed affirmatively and as a matter of law that the policy coverage was voided as to any claim made by the plaintiff herein.

Dated this 10th day of April, 1957.

VERGEER & SAMUELS,
/s/ By C. S. CROOKHAM,
Of Attorneys for Defendant.

[Endorsed]: Filed April 10, 1957.

[Title of District Court and Cause.]

United States of America,
District of Oregon—ss:

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Pre-trial order; Verdict; Judgment; Order denying motion for judgment notwithstanding verdict; Notice of appeal; Statement of points upon which appellant-defendant will rely; Designation of contents of record on appeal; Order to transmit exhibits to court of appeals; Undertaking on appeal

supersedeas; Supplemental designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8470, in which Farmers' Mutual Insurance Co. is the defendant and appellant and John L. Roe is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith exhibits 1 to 5; 10 and 11.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of May, 1957.

[Seal]

R. DE MOTT,

Clerk,

/s/ By THORA LUND,

Deputy.

United States District Court
District of Oregon

No. Civil 8470

JOHN L. ROE,

Plaintiff,

vs.

FARMERS' MUTUAL INSURANCE CO,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, January 18, 1957

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Mr. Carl R. Wells, of Attorneys for
Plaintiff. Messrs. Duane Vergeer and Charles S.
Brookham, of Attorneys for Defendant.

The Court: Call a jury.

Mr. Vergeer: If the Court please, in connection
with this matter, I believe that the pre-trial order
has not yet been signed by the Court.

The Court: I will sign it.

Mr. Vergeer: There is a further matter, your
Honor. [1]* I believe that we would like to present
a motion for judgment based upon the pre-trial
order.

The Court: I will hear you later about that. Call
a jury.

* Page numbers appearing at top of page of original Reporter's
transcript of Record.

(Thereupon a jury was duly and regularly empaneled and sworn, counsel for the respective parties made opening statements to the jury and thereafter the following proceedings were had:)

Mr. Wells: The plaintiff calls Kenneth Pedro your Honor.

KENNETH PEDRO

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Wells): Would you state your name for the jury, please, so they can hear it.

A. Kenneth Pedro.

Q. How old are you, Mr. Pedro?

A. 31. [2]

Q. What is your address?

A. 315 Northeast 141st.

Q. Is that in Portland, Oregon?

A. Yes, sir.

Q. What is your occupation?

A. I am a baker, work for Safeway.

Q. You work for Safeway?

A. Yes. I am a baker.

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. Yes, sir.

Q. Do you recall being involved in an automobile accident with the plaintiff, John Roe,—

A. Yes.

(Testimony of Kenneth Pedro.)

Q. Let me finish my question — in December, 1953, in Portland, Oregon? A. Yes.

Q. You recall that accident?

A. Yes.

Q. Were you insured against liability at the time of that accident? A. Yes.

Q. What was the name of your insurance company?

A. The Farmers' Mutual Insurance Company.

Q. Is that the same as the defendant in this case? A. Yes.

Q. Was a suit subsequently brought against you by the plaintiff, John Roe, for damages arising out of that automobile accident? A. Yes.

Q. Now, Mr. Pedro, it has been agreed here that you were personally served with a summons and complaint in plaintiff's lawsuit against you in Multnomah County on May 20th, 1954. What, if anything, did you do with that summons and complaint?

A. I mailed them in to the company.

Q. Would you describe in as much detail as you are able to recall the steps you took in mailing the papers to the company.

A. Well, I just addressed an envelope and stamped it. One thing I do remember, though, I was having a hard time spelling Enumclaw.

Q. What did you do with the envelope?

A. Mailed it.

The Court: How did you spell it?

(Testimony of Kenneth Pedro.)

A. I can't say right now. I looked it up in the policy.

Q. (By Mr. Wells): You looked it up on the policy when, Mr. Pedro?

A. When I mailed the letter, just before I mailed the letter. [4]

Q. Do you recall whether or not you put your return address on the envelope?

A. No, not for sure, but I always did, so I imagine I did that one.

Q. Were the papers of the Marshal returned to you through the mail or in any other way?

A. No, I never got them back.

Q. How long was it after you were served with the papers before you mailed them to the company?

A. I imagine it was within the day.

Q. Now, within the day of what?

A. That I made them out. I wasn't working then. I didn't have anything else to do.

Mr. Wells: Would you speak up, Mr. Pedro. I don't think the jurors at the end can hear your answers. I have no more questions.

Cross Examination

Q. (By Mr. Vergeer): Mr. Pedro, from whom did you buy this insurance policy?

A. Paul LaMond.

Q. Was he the agent that sold it to you?

A. Yes.

Q. He was the agent for the company, was he?

A. Yes, he was. [5]

(Testimony of Kenneth Pedro.)

Q. When you had your accident, Mr. Pedro, whom did you notify that you had had an accident?

A. Mr. LaMond.

Q. That is the agent? A. Yes.

Q. How far from your place does he live?

A. I really don't know how far. I called him by phone. I had his card.

Q. You had his telephone number?

A. Yes.

Q. And you had bought your insurance from him? A. Yes.

Q. You knew he was the company agent?

A. Yes.

Q. When you had your accident you called up and told him about it? A. Yes.

Q. What happened next?

A. About the next thing that happened concerning the accident, I went to trial.

Q. I didn't quite understand you.

A. I mean the next thing that happened concerning the accident, I went to trial.

Q. You went to trial? A. Yes. [6]

Q. You mean you were charged with some offense; is that it? A. Yes.

Q. I am talking now about with respect to your relations with the company. Did one of their claims men come out to see you? A. Yes.

Q. And they took a report from you, did they?

A. Yes.

Q. Did they come out soon after you called up?

A. Within a month.

(Testimony of Kenneth Pedro.)

Q. Would it have been within a week?

A. I don't think it was that soon.

Q. Anyway, they came out and made an investigation; is that it? A. Yes.

Q. Do you know how many people were hurt in this accident? Was it more than one?

A. Yes. There was a lady—I don't even remember her name.

Q. Yes, and there was a lady hurt in another car; is that right? A. Yes.

Q. Did that lady ever sue you?

A. Yes. [7]

Q. She did?

A. That is what I heard, anyway.

Q. Did you ever get a complaint and summons from that lady? A. Not that I know of.

Q. You only got one complaint and summons; isn't that right? A. I think so.

Q. The lady made a claim against you, but she didn't sue you; isn't that right?

A. She sued me or the company or somebody.

Q. You mean she made a claim? A. Yes.

Q. But you never were served by the Sheriff with more than one complaint and summons, were you? A. No, he just came that once.

Q. And you had been in contact with the local representatives of the company; you knew they had a local office, didn't you?

A. Outside of Paul LaMond I didn't know any others.

(Testimony of Kenneth Pedro.)

Q. And the claim agent who came out to see you? A. Yes.

Q. When you got this complaint and summons on the 20th of May, did you know what it was?

A. Yes. [8]

Q. Did the Sheriff's officer who brought it out explain to you what it was? A. No.

Q. But you knew what it was? A. Yes.

Q. Did you call the agent like you did when you had the accident and tell him that you had a complaint and summons?

A. No, not that time.

Q. You didn't. Did you attempt to call the claims department of the company in this city and tell them about it? A. No.

Q. You decided you would mail this to Enumclaw; is that it? A. Yes.

Q. What made you decide to do that?

A. Well, I had been told twice to mail everything I got to the company, once by LaMond and once by the guy that come out to see me.

Q. He said to send them everything that you got; is that right? A. Yes.

Q. So you say you placed this in the mail, but you don't know whether you put your return address on it or not? A. Not for sure, no.

Q. Did you put the address on it in your handwriting? [9] A. Yes.

Q. How do you think you spelled Enumclaw?

A. I don't know, but I got it off the insurance papers. I looked up the policy to get it off of.

(Testimony of Kenneth Pedro.)

Q. You had the policy there? A. Yes.

Q. You had the correct address? A. Yes.

Q. And you addressed it correctly, did you?

A. Yes.

Q. Then you did put it in the mailbox?

A. Yes.

Q. Did you do that yourself, or did you ask your mother to do it or your wife?

A. No, it would have to be me.

Q. Beg pardon?

A. It would have been me.

Q. It would have been you. Are you sure?

A. Yes.

Q. At that time where were you working?

A. I wasn't.

Q. You were unemployed? A. Yes.

Q. Did you stay home or at that address for any length of time after that? [10]

A. I am not sure just how long I stayed there but after we left there we just went out to my mother's, and I came back there every once in a while to find out if there was any mail or anything for me.

Q. Do you mean to that address? A. Yes.

Q. Was that an address where you rented : home?

A. It was rented. We was staying with some people until we got squared away.

Q. You were staying with some other people there? A. Yes.

Q. Did your mother know where you were all the time during the next couple of months?

(Testimony of Kenneth Pedro.)

A. The next couple of months, yes — May and June, yes.

Q. How long did you stay in town?

A. Up to the time they start hoeing strawberries, because we went out to Sandy and got a job hoeing strawberries, whenever that is.

Q. Then from Sandy where did you go?

A. Pendleton.

Q. Pendleton? A. Yes.

Q. Did you have a permanent address of any kind there?

A. No, we was only there a few days. I heard they was harvesting beans down there, or something, and I went down [11] there to see if I could get a job. It didn't turn out so good.

Q. Where did you go from there?

A. Up in Washington, Spokane.

Q. You went to Spokane? A. Yes.

Q. How long did you stay there?

A. A couple of years, off and on.

Q. How long?

A. Quite a while. A year and a half or two years.

Q. This was all after this occurrence, wasn't it?

A. Yes.

Q. When did you leave town, do you think? This accident was in May and you were served with the complaint and summons in May. You say you left town when the strawberry crop came up?

A. Yes. I was out to my folks', and I hoed strawberries out there.

(Testimony of Kenneth Pedro.)

Q. What month do you have strawberries, do you recall? A. That I don't know.

Q. Could it be June?

A. Could possibly. I don't know for sure.

Q. After that you were here and there and then went to Spokane? A. Yes. [12]

Q. Did you make any effort at any time to let the Farmers' Mutual of Enumclaw know where you were?

A. No. I didn't see any reason why I should.

Q. You didn't know of any reason why you should?

A. No. I figured as this wreck had been settled and I didn't have any car to be insured or anything.

Q. So you were never in touch with them at any time; is that right?

A. Not after I left Portland.

Q. Whom were you living with at that time?

A. Barnes, a guy I used to work with before got laid off down there.

Q. If any of your mail was returned to that address, would you know?

A. Yes. I went back and asked them.

Q. Was that address 3403 North Albina Street, Portland, Oregon?

A. Yes, I guess it was North Albina. I don't remember the number for sure.

Mr. Vergeer: I would like to have this marked for your Honor.

(An envelope addressed to Kenneth E. Pedro, 3403 North Albina Street, Portland, Oregon)

(Testimony of Kenneth Pedro.)

and a letter dated September 3, 1954, Ralph Parr to [13] Kenneth E. Pedro, were marked by the Clerk Defendant's Exhibits 4 and 5 for Identification.)

Q. (By Mr. Vergeer): Mr. Pedro, you have been handed Exhibits 4 and 5. No. 4 is an envelope. Have you ever seen that envelope?

A. Not to my knowledge, I haven't.

Q. Is that addressed to the address you had been last staying at when you dealt with the company?

A. I should imagine that is it.

Q. You think that is right, do you?

A. I wouldn't swear to the number, but it probably is.

Q. What is the date of the postmark on that? It is on the back side, I believe.

A. September 7, 1954.

Q. And at that time were you receiving mail addressed to you at that place or was anyone receiving it?

A. I was in Spokane.

Q. Had you left a forwarding address?

A. No.

Q. That letter, then, was never delivered to you; is that right?

A. I never seen it.

Mr. Vergeer: We will offer Exhibit 4 in evidence, your Honor. [14]

The Court: Admitted.

(The envelope above referred to was received in evidence as Defendant's Exhibit 4.)

Mr. Vergeer: And I will offer Exhibit 5.

Mr. Wells: If your Honor please, I will object to

(Testimony of Kenneth Pedro.)

No. 5, which is the letter supposedly in the envelope as not being material and as not having been properly identified.

The Court: It is admitted provisionally.

(The letter above referred to was received in evidence as Defendant's Exhibit 5, subject to the above ruling of the Court.)

DEFENDANT'S EXHIBIT No. 5

The Farmers' Mutual of Enumclaw
Portland Office
512 Weatherly Building
Portland 14, Oregon
Telephone EMpire 3442
September 3, 1954

Mr. Kenneth E. Pedro
3403 N. Albina Street
Portland, Oregon

Dear Mr. Pedro:

Would you please contact my office immediately in regard to your accident of December 6, 1953.

Yours very truly,

/s/ RALPH PARR,
Ralph Parr
Portland Claim Office.

RP:m

Registered Letter

Return Receipt Request

(Testimony of Kenneth Pedro.)

Q. (By Mr. Vergeer): Did you talk to Mr. Wells when you came back to town? A. Yes.

Q. How did that come about?

A. Well, Mr. Roe had been out to my folks' and places hunting for me, and when I got back to Portland he come out there hunting for me and they told him where I was at.

Q. What is Mr. Roe's business, if you know?

A. I believe he is a policeman.

Q. He had been out to your folks' place looking for you? A. Yes.

Q. That is why you went to see Mr. Wells? [15]

A. Yes.

Q. That was not until when? 1956?

A. Yes, yes.

Q. And in the meantime you had never communicated with the Farmers' Mutual of Enumclaw?

A. No.

Q. Did you at that time when you talked to Mr. Wells make any discovery about what had happened to this lawsuit?

A. Well, what do you mean, discovery?

Q. Did he tell you what had taken place; that he had a judgment against you? A. Oh, yes.

Q. He did tell you that? A. Yes.

Q. Did you tell him to get in touch with the Farmers' Mutual of Enumclaw? A. No.

Q. You didn't. You just left it that way?

A. Yes.

Mr. Vergeer: I think that is all.

(Testimony of Kenneth Pedro.)

Redirect Examination

Q. (By Mr. Wells): Mr. Pedro, to clarify the number of times you did actually have contact with the defendant, would you recite [16] to the jury the times that you contacted the defendant or their representatives.

A. That is, the insurance company?

Q. Or Mr. LaMond or their representatives.

A. I called Mr. LaMond when I had the accident. It seems to me I called him the next day about something, and then the time the adjuster come out. Three times all told.

Q. The adjuster came out when?

A. Shortly after the wreck.

Q. Those are the three times. Did you have any other contact with them?

A. Oh, they did come down to the bakery just after I got started working down there and asked a bunch of questions.

Q. That was sometime this fall, however; is that correct?

A. It was a long time ago. It must have been six months ago or so.

Q. Did the defendant or Mr. LaMond or any of the other people that called upon you ever request you to keep the insurance company advised of your address? A. No, not of my address.

Mr. Wells: That is all the questions I have your Honor.

(Testimony of Kenneth Pedro.)

Recross Examination

Q. (By Mr. Vergeer): They did, however, tell you to keep in touch with the [17] company, didn't they?

A. Yes. Well, if I got anything to send to them or anything.

Q. But when you found that there was a judgment against you you didn't consider it worth-while to notify them; is that right?

A. Well, I didn't have to wait long, because they was down there where I worked going through the timecards and everything else.

Q. I see. That was in September of 1956, wasn't it? A. It was this year, yes.

Q. Yes. That was just last year, this last fall. How long had you been in town when they found you?

A. Three months—three or four months.

Q. Actually, hadn't you gotten back to town about in January or February of '56?

A. I come down Christmas before last. My wife's father died. That is when we come back down, and then we went back to Spokane and got out furniture and stuff a couple of months later and come back. We finally got settled about March, I guess it was.

Q. And they found you in September; is that right? That is when they came and took the statement from you; isn't that correct?

A. I don't know. I couldn't swear to that. [18]

Mr. Vergeer: I think that is all.

Mr. Wells: No more questions, your Honor.

(Witness excused.)

Mr. Wells: Plaintiff rests, your Honor. [19]

Defendant's Evidence

ALMA KLUDT

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Is that Miss or Mrs. Kludt? A. Mrs.

Q. Mrs. Kludt, by whom are you employed?

A. By the Farmers' Mutual Insurance Company of Enumclaw.

Q. Where are you employed?

A. Presently in Salt Lake City in their branch office.

Q. In the branch office in Salt Lake City?

A. That is right, yes.

Q. Will you tell the jury where you were employed along about in May and June of 1954.

A. In the home office of Enumclaw.

Q. What were your duties there?

A. Well, I was head of the claims department of the girls, that is, at that time.

Q. As such did you have any duties with reference to incoming mail?

A. Yes, I did. The claims mail was always brought to my desk, and I would usually take care

(Testimony of Alma Kludt.)

of it. If there were any legal documents, I definitely would take care of them. [20]

Q. You received all legal documents that were received in the mail; is that correct? A. Yes.

Q. When you received a legal document—if you were not there, who did it?

A. The girl next to me, Mrs. June Semprimogik.

Q. That was the other girl on the desk, and if you were not there she did it; is that right?

A. That is right.

Q. Now, were you on that desk from the 1st of May until the end of July of 1956? I am not asking how long you were, but during that time were you?

A. Yes.

Q. In 1954? A. Yes.

Q. All right. Did you keep any kind of a log of any legal documents received by the company during that time?

A. Yes. We had what we called our summons and complaint book in which we entered every summons received.

Q. Every summons that was received in the office? A. Yes, as they were received.

Mr. Vergeer: I wish you would hand to the witness Exhibits 1, 2 and 3, if you will.

Q. Mrs. Kludt, can you tell the jury what these exhibits are? [21]

A. Yes. These are copies of pages from our summons and complaint book.

Q. Are they photostatic copies? A. Yes.

(Testimony of Alma Kludt.)

Q. Are they true and correct copies?

A. Yes.

Q. Is that a part of the log that you kept?

A. Yes, it is.

Q. Is there any other log whatever covering that period of time? A. No.

Q. And was every summons and complaint, or summons, either one, received in the mail in your office listed on those documents during the period that they cover? A. Yes, they were.

Q. What period of time do they cover?

A. Well, from the 19th of February of '54 clear through July, '54.

Q. That is, through the end of July?

A. Yes.

Q. Of 1954. At anytime or at any place in the log is there listed any complaint or summons in which Kenneth Pedro is the defendant?

A. There is not.

Q. Or an insured? [22] A. There is not.

Q. Was there any complaint or summons received in your office from Kenneth Pedro?

A. Not to my knowledge.

Q. If there had been, it would be listed on there? You are positive of that? A. I am positive.

Mr. Vergeer: We offer Exhibits 1, 2 and 3, your Honor.

The Court: Admitted.

(The three photostatic copies of sheets headed "Summons and Complaint 1954," were

(Testimony of Alma Kludt.)

received in evidence and marked Defendants' Exhibits 1, 2 and 3, respectively.)

Mr. Vergeer: You may inquire.

Cross Examination

Q. (By Mr. Wells): Mrs. Kludt, I believe you stated the claims mail was dropped on your desk?

A. Yes.

Q. Or on the desk of your associate who is next to testify; is that correct? A. Yes.

Q. Who dropped the mail on your desk? [23]

A. Well, the secretary of the company. She would get the mail after the mail clerk picked it up at the Post Office, then she would sort it as to departments, and all claims mail was brought to my desk.

Q. Did you have more than one mail clerk?

A. No.

Q. The mail was not delivered to your office; it was picked up at the Post Office?

A. Picked up, yes.

Q. Was that done every day?

A. Yes. In fact, twice a day.

Q. Then next it was delivered to the secretary of the company; is that correct?

A. The secretary of the secretary of the company.

Q. The secretary to the secretary? A. Yes.

Q. And the secretary to the secretary sorted it; is that correct? A. Yes.

(Testimony of Alma Kludt.)

Q. Did the secretary to the secretary who sorted the mail have any assistants helping in this matter

A. No.

Q. She did it all by herself every day?

A. Yes.

Q. Did the mail clerk ever sort the mail, as far as you know? [24] A. No.

Q. Did the person who sorted the mail ever have anybody else deliver it to the various departments

A. I don't think so. I don't ever remember anybody else doing it.

Q. But you are not sure?

A. Well, I am just trying to remember whether she was ever absent. No, I believe she did it all the time.

Q. Is there more than one place at your office at which the secretary would be delivering mail?

A. Oh, yes; quite a few departments.

Q. How many would you say there were in 1954? A. Oh, perhaps a half a dozen.

Q. Beg pardon?

A. A half a dozen different places.

Q. Of course, all you have been testifying to with respect to receiving the summons and complaint from Kenneth Pedro is as to documents which were brought to your desk; is that correct?

A. That is right.

Q. How long have you been with the company, Mrs. Kludt? A. Since July 1st of 1952.

Q. Had you been working in the head office from the beginning of your employment?

(Testimony of Alma Kludt.)

A. From the beginning until July of '55. [25]

Q. Were you working in the claims department during all that time?

A. From July 1st, 1952, until January of 1955.

Q. You were in the claims department?

A. Yes.

Q. Were you in the same position in the claims department as you were at all times?

Let me rephrase the question: Did you also have the same responsibility in the claims department with respect to receiving summons and complaints and noting them on the log?

A. No. For about a year after I started to work another girl was my predecessor. She would take care of those things.

Q. For a while you were her assistant; is that it?

A. Yes.

Q. Is the head office located in one building?

A. Yes.

Q. By itself. There are not other offices in that building, are there? A. No.

Q. That was true in May, 1954? A. Yes.

Q. Is there more than one floor, the head office?

A. It is now, yes.

Q. But it was not in May, 1954? [26]

A. I can't remember when they built the addition.

Q. Approximately how many employees would you say were employed at the head office in May, 1954?

A. I couldn't say. I don't remember.

(Testimony of Alma Kludt.)

Q. Did you receive any other correspondence besides summons and complaints?

A. Well, all claims mail, anything pertaining to claims.

Q. That would be from other branch offices of the company as well as from claimants?

A. Yes.

Q. How much mail would you say you received on an average basis in 1954?

A. That would be hard to estimate.

Q. Would it be considerably more than as shown in the log exhibits, Nos. 1, 2 and 3? Would it be considerably more than in the documents that are listed?

A. Well, yes. Those are just our summons and complaints. The rest of the claim mail was certainly more than the summons we received.

Q. Does the summons and complaint part of it comprise only a small part of your incoming mail?

A. Yes, of all mail, that is right.

Q. In what order are the summons and complaints listed in the logbook?

A. Well, it has been quite a while. [27]

Q. I will hand you one of these.

A. It would be the policy number.

Q. No, I mean in what chronological order.

A. Oh, according to when they were received, as we received them in the office.

Q. As they were received by the company?

A. Yes.

Q. There is a column on here marked "Dat

(Testimony of Alma Kludt.)

Served." Does that refer to the date they were served upon your assured or the date they were received by the company?

A. The date they were served upon the assured.

Q. How did you have that information?

A. A lot of them were stamped served at such-and-such a date, with the certain Sheriff's stamp or something. There was quite a few that were not, and then we left those blank.

Q. I notice there are some blanks left with respect to dates served.

A. If we didn't know, we just left them blank.

Q. Is it not indicated somewhere on the logbook as to the date these various summons and complaints were received? A. No.

Q. How is it you can identify these papers as covering the period February to July, 1954?

A. Well, there are some there with the stamp received a certain date, and then as we received them, why, we always [28] entered them so we know that we received them in that time.

Mr. Wells: Thank you.

Redirect Examination

Q. (By Mr. Vergeer): Mrs. Kludt, I wanted to ask you about the secretary who actually received or sorted the mail. What was her job before she received and sorted the mail?

A. She had been doing my job.

Q. I see. Now, when you arrived you worked a

(Testimony of Alma Kludt.)

year under that girl while she did the job on the claims desk; is that right? A. Yes.

Q. Then you moved to the claims desk and she thereafter sorted all the mail? A. That is right.

Q. And delivered it to the claims desk; that is, all those matters pertaining to the claims department? A. That is right.

Q. But she spent at least a year that you know of doing the job you were doing?

A. That is right, yes.

Q. She knew a summons and complaint when she saw it? A. Oh, she sure did.

Mr. Vergeer: That is all.

(Witness excused.) [29]

JUNE SEMPRIMOGSIK

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Is that Miss or Mrs. Semprimogsik? A. Mrs. Semprimogsik.

Q. Where do you work?

A. I am employed at the Farmers' Mutual of Enumclaw in the home office at Enumclaw, Washington.

Q. By the way, where is Enumclaw, Washington?

A. That is a real pretty little town near——

Q. It is about 20 miles south of Seattle, isn't it?

A. That is right.

(Testimony of June Semprimogsik.)

Q. And about 10 or 15 miles east of the main highway to Tacoma; is that right?

A. That is right.

Q. All right. Now, what were your duties at that place during the months of May, June and July of 1954?

A. I was employed in the claims department, and I was under Mrs. Kludt.

Q. The lady who just testified?

A. That is right. She was my boss and I was next in line to her.

Q. If she were absent at any time, what were your duties? [30]

A. I would take over as supervisor of personnel in our department and perform all her duties that she had done.

Q. Did that include the duty of sorting the mail and listing any received complaints or summons in the log?

A. That is right.

Q. If she were not there, you were there; is that right?

A. That is right.

Q. Was there any time during those months that you might both have been absent?

A. No, not at that time.

Q. During those months there was definitely one or the other of you there every day?

A. Yes.

Q. Have you seen Exhibits No. 1, 2 and 3, which comprise the log? I think you have.

A. Yes.

Q. Have you examined the log that was kept during that time?

A. Yes.

(Testimony of June Semprimogsik.)

Q. Was any complaint or summons received through the mail by the company in which Mr Pedro was a defendant? A. No.

Q. Or in connection with any policy of his?

A. No.

Q. How many people were employed in the office about that [31] time? Do you have any idea?

A. I would say about 70.

Q. About 70 people?

A. Or 75 in our whole home office.

Q. That is the entire home office? A. Yes.

Mr. Vergeer: You may inquire.

Cross Examination

Q. (By Mr. Wells): Mrs. Semprimogsik, was the claims mail put on your desk or on Mrs. Kludt's desk during the period from May to July, 1954?

A. It was on Mrs. Kludt's desk.

Q. When Mrs. Kludt was absent you would take the mail from her desk; is that right?

A. No, I always would work at her desk. I would take it up to her desk.

Q. Was the mail which was put on Mrs. Kludt's desk ever opened before it was put on the desk?

A. I believe some of it they do have an automatic opener. Some of it could have been—I don't know just what could have been opened——

Q. Beg pardon?

A. I don't know just what could have been opened or unopened [32] by this automatic opener.

(Testimony of June Semprimogsik.)

Q. The mail is opened by a machine; is that correct?

A. Some of it was. We have some stamped envelopes, self-addressed envelopes, that we do send out claims, and it definitely goes—I believe some of that may have been opened on the machine.

Q. Now, when sorting mail out not every envelope is so addressed that it is apparent that it is for the claims department, is it?

A. Most of the correspondence is "Attention Claims Department."

Q. Unless there is some indication, however, on the envelope, you would not know which department it would go to, would you?

A. Well, I would imagine that it is opened then.

Q. Do you imagine that the secretary of the secretary of the company opened the mail and then determined which department it went to?

A. Yes.

Q. And sorted it. So that the mail had been opened before it came to the claims desk; isn't that correct? A. Yes.

Q. The papers had been taken out of the envelope; is that correct?

A. I don't believe that it was ever taken out and clipped, [33] no. It would come intact.

Q. It was put back in the envelope before it was delivered to your desk; is that right? A. Yes.

Q. Is it possible that incoming mail in this period we are speaking of could have been sorted improp-

(Testimony of June Semprimogsik.)

erly and delivered to the wrong department in the company?

A. Sometimes claims correspondence is sent to another department, but it always reaches our department within that day, because incoming mail is handled daily.

Q. Is it possible that incoming mail during this period may have become lost by accident or thrown away by mistake? A. Highly improbable.

Q. But it is possible, isn't it? A. No.

Q. Is it possible that a summons and complaint that was received during this period could have been mixed up with wastepaper and discarded?

A. No.

Mr. Wells: That is all the questions I have.

Redirect Examination

Q. (By Mr. Vergeer): Has there ever been a summons and complaint missing from the office?

A. Never.

Mr. Vergeer: That is all.

(Witness excused.) [35]

RALPH W. PARR

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Mr. Parr, what is your name, please? A. Ralph W. Parr.

(Testimony of Ralph W. Parr.)

Q. By whom are you employed, Mr. Parr?

A. Farmers' Mutual Insurance Company of Enumclaw.

Q. Were you employed by the Farmers' Mutual Insurance Company of Enumclaw in the early part of 1954? A. Yes.

Q. What is your function?

A. I am a claims adjuster.

Q. In connection with your work as a claims adjuster did you have occasion to meet Mr. Pedro, who testified here? A. Yes.

Q. About when was that?

A. Oh, it wasn't too long after the accident. I believe about towards the end of December.

Q. Was that in '53? A. '53.

Q. When was the accident, do you know?

A. I believe it was in December, the first week in December.

Q. And you met him sometime in December of 1953? [36] A. Yes.

Q. In connection with the accident, was it?

A. Yes.

Q. Did you give Mr. Pedro any instructions?

A. Yes, I talked to him quite some time on the porch of the house. As I recall, I believe he was having furnace trouble at that time, and I gave him instructions on the accident, and also gave him a card and told him if he got any incidental papers or anything to mail them to me at the office in Portland.

(Testimony of Ralph W. Parr.)

Q. Did you tell him he was to keep in touch with the company until this matter was disposed of?

A. Yes, I did, because there was personal injuries in it.

The Court: Because of what?

A. There was personal injuries in the case.

Q. (By Mr. Vergeer): Did you thereafter have occasion to see Mr. Pedro at any other time?

A. No.

Q. Did you have occasion to discuss the claims—were there more claims than one? A. Yes.

Q. How many claims were there?

A. There was two injury claims in it, two separate cars.

The Court: It was a three-car collision?

A. Yes. [37]

Q. (By Mr. Vergeer): Did attorneys represent each of the claimants? A. Yes.

Q. Who represented the plaintiff in this case?

A. Mr. Wells.

Q. And who represented the other claimant?

A. I believe it was Mr. Bernstein.

Q. Now, did you negotiate for the settlement of these claims? A. Yes.

Q. And were you successful with any of them?

A. With Mr. Bernstein's claim only.

Q. That claim was settled, was it? A. Yes.

The Court: Whom did you negotiate with in this case?

A. Mr. Wells.

Q. (By Mr. Vergeer): Then before you found

(Testimony of Ralph W. Parr.)

that there was a complaint and summons in this case, when was the last time you had seen Mr. Wells?

A. I believe I talked to him on the phone and we discussed it. And, of course, any demand that he made at that time I had to submit it to the home office for authority to settle, and we were trying to get medical reports and information from him, and a list of specials. Then the thing kind of just more or less died right there. [38]

The Court: You didn't give the date he asked for.

A. It would be hard for me to judge, but it would be, oh, probably sometime in January or February.

Q. (By Mr. Vergeer): Of 1954? A. Yes.

The Court: When was the case filed?

Mr. Vergeer: May 20th, your Honor, was the date of service.

Q. Did you know at any time that this action was filed until after there was a judgment in it?

A. No, I didn't.

Q. Did Mr. Wells ever get in touch with you to inform you that an action had been filed against the company? A. No, he didn't.

The Court: Did he tell you he was going to file one? A. No, he didn't.

Q. (By Mr. Vergeer): How did you learn that there was a judgment against this defendant Pedro?

A. A letter from Mr. Wells.

Q. About when was that?

(Testimony of Ralph W. Parr.)

A. The letter would be in the file. I don't remember.

Q. Would you like to refresh your memory?

A. Yes.

Mr. Vergeer: May this be handed to the witness your Honor? [39]

The Court: Yes.

A. This is——

Q. (By Mr. Vergeer): When was it that Mr. Wells notified you that there was a judgment?

A. It would be September 1st of 1954.

Q. This was mailed to an agent's office on North Montana Avenue, who in return called me and notified me of this correspondence and then brought it in to me.

The Court: What was his name?

A. Mr. Woods.

The Court: The agent?

A. Yes.

Q. (By Mr. Vergeer): Now at any time during the intervening period did Mr. Wells notify you that he was filing an action or that an action had been filed? A. No, sir.

Q. Or that he intended to take judgment?

A. No, sir.

Q. You heard nothing of that?

A. Not one thing.

Q. Then you were notified that there was judgment; is that right? A. Yes.

Q. When is the next time you saw Mr. Pedro?

A. Well, I was looking for him for quite some

(Testimony of Ralph W. Parr.)

time, and [40] it wasn't until just recently—I believe it was in the past two or three months—that we finally found him.

Q. To refresh your memory, could that have been in September?

A. It possibly could, yes.

Q. Was a statement taken from him at that time? A. Yes, it was.

Q. And Mr. Crookham was with you?

A. Yes, he was.

Q. Now, in the meantime did the company have an investigation made in an attempt to locate Mr. Pedro?

A. Yes, I tried to locate him, and not having too much time I requested the company to call in a private investigating concern to try and locate him. And I think that file will reflect——

Q. Never mind that. Did you get a report from such an investigator as to the matters that had been covered in the investigation? A. Yes.

Q. I will hand you Exhibits 6, 7 and 8, Mr. Parr, and ask you if that is a report that you received.

A. Yes, it is.

Q. From whom did you finally discover where Mr. Pedro was?

A. Well, I think it was through Mr. Crookham advising me that he was in town. [41]

Q. Mr. Crookham advised you? A. Yes.

Q. That is the first you heard about that?

A. Yes.

(Testimony of Ralph W. Parr.)

Q. That was just before you went and took the statement from him, and that was in 1956?

A. Yes.

Mr. Vergeer: I would like to offer that report your Honor.

The Court: If it is objected to, I will sustain the objection.

Mr. Wells: That is objected to, your Honor.

The Court: Objection sustained.

Mr. Vergeer: All right.

Q. Who made this report, by the way?

A. I believe it was the Retail Credit Investigation, isn't it?

Mr. Vergeer: If you know. I couldn't testify I think that is all. You may inquire.

Cross Examination

Q. (By Mr. Wells): Mr. Parr, did you ever call upon me personally? A. No.

Q. You had several telephone conversations with me, however? [42]

A. Yes.

Q. How many telephone conversations do you recall having with me?

A. It has been quite some time.

Q. Would you say more than one?

A. Yes, I would say more than one.

Q. Would you say as many as four?

A. Well, I had in mind about three.

Q. When would you say was the last telephor conversation?

(Testimony of Ralph W. Parr.)

A. I don't believe that I could accurately say, it has been so long.

Q. You don't recall; is that it?

A. No. I believe that I would have written a report on it when I did talk to you.

Q. Did you receive any correspondence from me other than the letter directed to the Farmers' Mutual of Enumclaw which you have identified?

A. I don't believe so.

Q. What was your address in March, 1954?

A. We had a claims office in the Weatherly Building.

Q. 512 Weatherly Building? A. Yes.

Q. But you don't recall receiving any other letters from me; is that correct?

A. No. I was alone in the office, and I don't [43] remember all the correspondence I received.

Q. Are the papers with you here in the courtroom today? A. I presume that they would be.

Q. From them could you ascertain whether or not you did receive other correspondence from me?

A. I assume that I may.

Mr. Crookham: Would you hand this to the witness, please.

(A file was handed to the witness.)

Q. (By Mr. Wells): Specifically, I will ask you if you received a letter from me dated April 7, 1954, and a letter from me dated March 29, 1954?

A. What was the first date, sir?

Q. April 7, 1954.

(Testimony of Ralph W. Parr.)

The Court: Is that file in chronological order?

A. Yes.

The Court: Did you write him a letter on April 7, 1954?

Mr. Wells: Yes, your Honor, and one dated March 29, 1954.

The Court: Have you got copies of them?

Mr. Wells: Yes.

The Court: I am going to quit pre-trying these cases outside of the courtroom, if you don't exchange your exhibits with each other and record them in your orders. That is the [44] very point of pre-trial, so we don't come in here and have to take everybody's time looking through a big file. You can put those copies in. I am not going to wait for him to hunt up the originals.

Mr. Wells: All right, your Honor. We would like to have the copies marked for identification and offer them in evidence.

Mr. Vergeer: Certainly we have no objection to their admission.

The Court: They are admitted.

(Copies of the letters above referred to, dated March 29, 1954, and April 7, 1954, Carl Robert Wells to Ralph Parr, were thereupon marked and received in evidence as Plaintiff's Exhibits 10 and 11, respectively.)

PLAINTIFF'S EXHIBIT No. 10

(Copy) March 29, 1954

Mr. Ralph Parr,
Farmer's Mutual of Enumclaw,
512 Weatherly Building,
Portland, Oregon.

Re: Your insured, Kenneth E. Pedro; Loss of
December 6, 1953; John L. Roe, claim of.

Dear Sir:

Confirming our telephone conversation of March
29, 1954, we represent John L. Roe in his claim for
personal injury arising out of an automobile acci-
dent on December 6, 1953, with your insured, Ken-
neth E. Pedro.

Mr. Roe is a city policeman and was driving a
police patrol car at the time of the accident. We
understand that he had stopped the police car
headed south on the 3600 block of North Mississippi
Avenue, preparatory to backing into a parking
space. A car driven by Adolf G. Sundberg had
stopped about ten feet behind the police car, when
your insured, also driving a car south on Missis-
sippi Avenue, crashed into the rear of the Sundberg
car, knocking it forward and into the rear of the
police car. It appears that your insured was intoxi-
cated at the time of the accident.

Mr. Roe states that his head was whipped back-
wards by the impact causing injury mainly to his
neck. He states that his hearing in his left ear was
impaired for about three days by an aching, ring-

ing and dullness. In addition, he strained the muscles of his neck, shoulders and back. He was treated by Dr. Edward C. Parkinson, 7313 N. Leavitt Avenue, who stated to us on March 2, 1954, that his ear and neck complaints had cleared up but that his back pain persisted "improving, but outcome undetermined for another two months; still requires Rest and treatment at intervals."

We have not discussed settlement with Mr. Roe but he has, however, requested us to pursue his claim pending settlement. We would recommend settlement for \$1,750.00.

Very truly yours,

McCormick, Wells & Fulop,

CRW/hm Carl Robert Wells.

PLAINTIFF'S EXHIBIT No. 11

(Copy)

April 7, 1954

Mr. Ralph Parr
Farmers' Mutual of Enumclaw
512 Weatherly Building,
Portland, Oregon

Re: Your insured, Kenneth E. Pedro; Loss on December 6, 1953; John L. Roe, claim of.

Dear Mr. Parr:

Enclosed is a copy of the medical statement received from Dr. Parkinson regarding John L. Roe. As you can see, it is the briefest kind of a statement and hardly satisfactory. It was, however, the

best that I could worm out of them and it took a long time to get.

I called Dr. Parkinson's office today to get more details. I was informed by them that Roe was treated at Dr. Parkinson's office several times and also that x-rays were taken at Emanuel Hospital. They stated that the otitis or the ringing, aching and dullness in the left ear was caused by the accident and not by a previously existing infection. They also stated that the symptoms from this type of injury are often progressive; that is, all the complaints do not usually appear immediately after the accident, but may crop up as late as 12 months or more afterward.

Very truly yours,

Carl Robert Wells.

CRW/hm

Encl.

Re: Mr. John L. Roe

Diagnosis:

1. Mild otitis, external, left.
2. Strain, subsidiary neck muscles. (Splenius apitus.)
3. Subsequent complaint on 12-28-53 with discomfort and pain, low back, onset 12-10-53.

Treatment:

Examination

Therapy

Two Rx's

Follow-up care

Prognosis:

1. and 2. are healed.

3. improving, but outcome undetermined for another two months.

Still requires Rx and treatment at intervals.

Edward C. Parkinson, M.D.

R. Blessing, R.N.

Mr. Wells: That is all the questions I have.

Mr. Vergeer: That is all. [45]

(Witness excused.)

CHARLES S. CROOKHAM

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Mr. Crookham, you are an attorney, are you? A. Yes, sir.

Q. You are associated with me in my office?

A. I am.

Q. Did you have any connection with this lawsuit during its preparation? A. I did.

Q. And in that connection did you have occasion to prepare some interrogatories for the plaintiff? A. Yes, sir.

Q. Did any of those interrogatories have anything to do with the location or whereabouts of Mr. Pedro?

A. Yes. The interrogatories were directed to Mr. Wells and desired to know from him certain information on which he was going to rely on his side of the case, and particularly what information e

(Testimony of Charles S. Crookham.)

Q. I would rely on in regard to the forwarding of the summons and complaint to the company, if there was such information. And then I might say that those were objected to by Mr. Wells, and a hearing was had before Judge Solomon, I think, on the 10th of September, 1956.

Q. At that hearing did Mr. Wells tell you where Mr. Pedro could be located?

A. At that time and for the first time, from the file, to my knowledge, Mr. Wells informed me that Mr. Pedro was back in town and had been back in town for some number of months. And subsequently, based upon knowing that he was back in town, Mr. Parr and I were able to locate him and make the statement we have referred to.

Mr. Vergeer: May I have that exhibit?

Mr. Crookman: I have that as a sealed exhibit for impeachment purposes only.

Mr. Vergeer: As long as it is a sealed exhibit, we won't introduce it at this time.

Q. That is when you took the statement from Mr. Pedro that has been referred to?

A. That was the 13th of September, 1956.

Q. And your information as to his whereabouts came from Mr. Wells?

A. Yes, Mr. Wells indicated he was back in town.

Mr. Vergeer: That is all.

Mr. Wells: No questions.

(Witness excused.)

Mr. Vergeer: We would like to call Mr. Wells your Honor.

Mr. Wells: I will object to that, your Honor.

The Court: Why?

Mr. Wells: Because here I am representing the plaintiff, and if it is going to involve me whatsoever as to confidential and privileged communications——

The Court: We will hear what is involved when we get his questions.

CARL R. WELLS

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Vergeer): Mr. Wells, you are an attorney, are you not? A. Yes.

Q. You are representing the plaintiff in this case? A. Yes, I am.

Q. When did you first start to represent this same gentleman? A. Mr. Roe?

Q. Yes.

A. Sometime shortly after the automobile collision with Mr. Pedro.

Q. Was that in December of 1953? [48]

A. I believe it was.

Q. Now, thereafter did you have occasion to talk to Mr. Parr on the telephone? A. Yes.

Q. You knew, did you, who was the insurance

(Testimony of Carl R. Wells.)

carrier that carried insurance on Mr. Pedro's car?

A. I understood it was the Farmers' Mutual of Enumclaw.

Q. Yes. And then you talked to Mr. Parr about it? A. Right.

Q. And you had written Mr. Parr at least two letters which are now in evidence; is that right?

A. That is right.

Q. When you filed the complaint in this case did you notify Mr. Parr that you were filing the complaint?

A. You mean the complaint in the case of John L. Roe vs. Farmers' Mutual Insurance Company?

Q. That is correct. A. No.

Q. As a matter of fact, you didn't inform the company that you were filing a complaint or had commenced any litigation until after you had taken the default judgment; isn't that right?

A. You are referring to the case of John L. Roe against the Farmers' Mutual Insurance Company?

Q. That is correct,—no, I am referring to the case of [49] Roe vs. Pedro.

A. Well, I believe my answer to your previous question was based on the other case.

Q. Let's back up, then. Did you inform Mr. Pedro or the company in any manner that you were filing this action by Mr. Roe against Pedro?

A. Only in this respect: That when Mr. Parr, in response to my letter of March 29th, 1954, which was written after we had filed the case against Mr. Pedro—Mr. Parr called me and told me he thought

(Testimony of Carl R. Wells.)

that the plaintiff didn't have a good claim, and he was irritated with the language in my letter which stated we were going to pursue our claim pending a settlement. And I asked him at that time if he knew where I might serve Kenneth Pedro, and he told me—or I asked him for his address and he told me it was on North Albina Street.

Q. But you didn't tell him after you had filed the complaint, and when you received no reply thereto or answer or other appearance you did not call him and get in touch with him, did you?

A. To my best knowledge, after our telephone conversation of a day or two after my letter was written, I had no other communication with Mr. Parr.

Q. That is right. But you did communicate with him after you had taken judgment? [50]

A. I made a demand on the company and apparently that was forwarded to Mr. Parr.

Q. How long after you took the judgment did you do that?

A. The date will appear on the letter. I don't remember.

Mr. Vergeer: All right. That is all.

(Witness excused.)

Mr. Vergeer: That is our case, your Honor.

The Court: Do you have rebuttal, Mr. Wells?

Mr. Wells: If your Honor please, may I have a couple of minutes recess to find out if I do have rebuttal?

The Court: Yes. We will all stay in the courtroom.

(Short recess.)

The Court: Is there anything here that shows when the case was filed against Pedro?

Mr. Wells: I have a receipt from the Court Clerk, your Honor, showing the date the complaint was filed.

The Court: When was it?

Mr. Wells: March 17th, your Honor.

The Court: When did Pedro say he was served?

Mr. Crookham: May 20th.

The Court: Is there anything that shows where he was served, what county?

Mr. Crookham: He was served in Multnomah County, your Honor. [51]

Mr. Wells: We have no rebuttal, your Honor.

The Court: There has been no dispute about the dates there? This exchange of dates is agreed?

Mr. Vergeer: That is right. If Counsel says so, I assume that is correct.

The Court: Now, Ladies and Gentlemen, I don't know whether this is going to be good news for you or bad news. I never submit cases these days, especially in this kind of weather, to juries in the afternoon. I am simply not going to have our womenfolk kept here after dark. This being Friday, that means that this case will have to go over until Monday when it will be finally submitted to you. I am not going to ask you to come back tomorrow. You will have to come back Monday anyhow on account of other cases that are for trial in the court. So you

may go now until Monday morning at 9:00 o'clock. Be in this courtroom at 9:00 o'clock Monday morning. I hope the rain-makers meanwhile have been correct that the weather will become more like Western Oregon weather.

Do not discuss this case among yourselves or with others or permit it to be discussed in your presence until it is finally submitted to you.

(The jury was excused from the courtroom and thereafter the following occurred [52] out of the presence and hearing of the jury:)

The Court: I suppose you gentlemen want to discuss some law. I really don't know where I am in this case. Do you want to come back this afternoon? It is a quarter of 12:00 now. Do you want to be heard at some length, either one of you?

Mr. Wells: I don't particularly care to be heard, your Honor.

Mr. Vergeer: I have a few matters I would like to call to the Court's attention. I don't think it would take very long, but it might be better to come back at 2:00.

(Thereupon a recess was taken until 2:00 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows, out of the presence and hearing of the jury:)

Mr. Vergeer: I understood, your Honor, that Counsel did not want to be heard at this time, so I assume that I will discuss this matter first.

I would like to present and offer into evidence

this policy which it is agreed in the pre-trial order may be offered. [53]

The Court: Will you mark it.

(The insurance policy referred to was marked and received in evidence as Defendants' Exhibit 9.)

Mr. Vergeer: Now, with respect to the law in this matter, my motion which I originally intended to make this morning was to the effect that we should be entitled to judgment based upon the pre-trial order. The matters and things that I am going to call to the Court's attention touch equally upon that subject and upon the law generally of the case. Therefore, there is no need to differentiate.

It is the theory of the plaintiff in this case, apparently, that we have the burden of proving that the insured did not send the summons and complaint to us; that is, within the meaning of the policy and in compliance with the policy, and also that the insured did not cooperate with us.

First of all, I would like to take issue as a matter of law with those propositions. The conditions of the policy the Court will find stated herein, but I wanted to call the Court's attention particularly to the Oregon case of Hoffman vs. Employers' Liability Assurance Company, 146 Oregon at Page 66. That case, which is a local case, I think would tend to govern the situation here, and it distinctly points out that the proposition is really that the [54] insured must show performance of all the conditions of the policy before he can recover.

Now in this particular instance we have a situation where the plaintiff, of course, is in the position of the insured if he is entitled to recover in this case. So it was our thought that it would be necessary for the plaintiff to allege that he had performed all conditions precedent and all conditions of the policy as a condition of his being permitted to proceed with this case and to collect under the policy.

(Further discussion between the Court and Counsel.)

(Thereupon an adjournment was taken until Monday, January 21, 1957, at 9:00 a.m.) [55]

Portland, Oregon, January 21, 1957

(Court reconvened, pursuant to adjournment at 9:00 o'clock a.m., and proceedings hereinafter were resumed out of the presence and hearing of the jury, as follows:)

The Court: Gentlemen, did you want to talk some more about the things we were talking about Friday?

Mr. Vergeer: Not at this time.

Mr. Wells: No, your Honor.

The Court: I was talking to Mr. Beckwith over the telephone, and I asked him to give me some dates out of the record that might be controlling. The accident was December 6th, 1953, and suit was commenced sometime before March 29th, 1954. Do you know when it was, Mr. Wells?

Mr. Wells: March 17th, your Honor.

The Court: I notice there is an endorsement of change of address on the policy. Pedro was served

on May 20th. Default judgment was taken July 30th. Is there anything in the record to tell when Pedro learned of the judgment?

Mr. Wells: Not that I know of.

Mr. Vergeer: He testified, your Honor, that he did when he returned to Portland and Counsel called him. That was in 1956, if I remember correctly.

Mr. Wells: That may be correct, your Honor.

Mr. Vergeer: Yes, it was in the summer of '56, your Honor.

The Court: When did the insurance company learn of the judgment?

Mr. Vergeer: That was in the fall of '56, your Honor.

Mr. Wells: September 1st, 1954, according to Mr. Parr.

Mr. Vergeer: That is correct. That is when we located Mr. Pedro, is what I am getting at.

The Court: You say you located him then?

Mr. Vergeer: No, we located him in the spring of '56, your Honor — pardon me — in the summer of '56.

The Court: You learned of the judgment September 1st, 1954?

Mr. Vergeer: Yes. We discovered Pedro September 15th of '56.

The Court: After he returned from Spokane?

Mr. Vergeer: Yes, your Honor.

The Court: Your point on cooperation seems to me to be that you had a year under the State statute, a year from July 30th, 1954, in which to move

to set aside the judgment on the grounds of fraud or excusable neglect, whatever the statute is or that.

Mr. Vergeer: That is right, your Honor.

The Court: That time ran out one year later July 30th, 1955. And you didn't know where Pedro was until after that [57] in '56, but you did know on September 1, 1954, that a judgment had been taken.

Mr. Vergeer: Yes, your Honor.

The Court: Why couldn't you have moved then?

Mr. Vergeer: It was impossible to move then. His affidavit is necessary and so is his answer. The motion must be accompanied by the answer which would necessarily be signed by him in the State Court, by the party. It has to be verified by the party in the State Court.

The Court: I think that is a doubtful question. I find it pretty difficult to pass on it. I should think that as of that time on the showing you could have made the State Court would have subrogated you to the defendant's position. You never can find out until you try, Mr. Vergeer.

Mr. Vergeer: That is possibly true, your Honor. I don't want to delay this thing unnecessarily, because the Court is probably familiar with the statute which calls for the affidavit of the party to set aside a default, my understanding is, and also the answer in the State Court must be verified by the party.

The Court: Yes. Suppose he had died or become insane?

Mr. Vergeer: Then it would have to be verified by his successor-in-interest, of course. Now the insurance company would not have been permitted to be a successor-in-interest in any sense in the State Court. [58]

The Court: You are a subrogee, aren't you?

Mr. Vergeer: Yes, as subrogee. I withdraw that to that extent, yes. But certainly not as a party in interest in an action for damages of this kind.

Mr. Wells: If your Honor please, I believe the State statute allows the attorney to verify the complaint where the party is out of the county. I am not familiar with the statute relating to the setting aside of a default judgment. However, it occurs to me that the primary reason why the defendant would not want to appear in the State Court would be that by making its appearance it might waive its right to claim as against the insured that he did not comply with all the policy conditions.

The Court: I think this is a very confused situation. I am going to have a good deal of trouble if I try to instruct on the cooperation end of it. I don't see anything else in here on the facts.

Mr. Vergeer: His failure to let us know where he was. Yes, that is right, your Honor. That is a question of cooperation.

The Court: I should think his good faith would be a factor there and the reasonableness of his conduct. If I do instruct, that is the way I will talk to the jury. You can argue the cooperation point. I haven't quite made up my mind on that. I will be glad to hear what you have to say [59] as to the

forwarding of the suit papers. That presents a fact question. I agree with you he has the burden of proof that he forwarded them, but I don't agree with you that goes to the extent that he has to show that they were received by the company. It is open to you, of course, to argue that because you didn't receive them he didn't forward them.

All right. Bring in the jury.

(Thereupon the jury returned to the courtroom, counsel for the respective parties made arguments to the jury, and thereafter the Court instructed the jury as follows:)

The Court: Ladies and Gentlemen, it appears to me that there are two controlling fact questions in this case for your decision. The policy provides that in the event of a suit against the insured growing out of an accident that the insured shall immediately forward all suit papers to the insurance company.

Now, there is room for a difference of opinion as to what that means. My view of it is that if the young man who was on the witness stand, who was the insured, did what he claims he did right away after the papers were served on him, put them in the mail and addressed them to the insurance company at its home office, which he says he [60] took from the policy, put the necessary stamps on the envelope and put on a return address, that is all he was required to do.

The company says it never received the papers. I repeat that it is my view that all the insured had to do under the language of this policy was

to do the things I have related, and put them in the mail in the way I have just related. This plaintiff has the burden of proving that that was done by a preponderance of the evidence, which means a greater weight of the evidence.

Now, there is another fact question in the case which grows out of another policy provision, that in the event of suit the insured must or shall cooperate with the company and upon the company's request shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits.

A judgment was taken by Mr. Wells here for his client against Pedro, a default judgment, on July 30, 1954. The company, so it contends, not having received the suit papers and not having any notice that the suit had been brought, says it didn't have the opportunity to defend the case and thereby was prejudiced.

That judgment was taken on July 30, 1954. On September 1, 1954—that would be just a little more [61] than a month afterward—the company learned that the judgment had been taken against Pedro by information I think given by Mr. Wells to one of the company's representatives. There is a letter in the file, which you will have among the exhibits, written by the company's representative here, or one of its representatives, dated two days later, September 3rd, is my recollection, addressed to Pedro at an address here in Portland, asking him to get in touch immediately with the company about

this matter. And that letter was returned, as you will see on the envelope.

You may remember Pedro said he was out of work and he was going here and there trying to get work. He spoke of hoeing strawberries, I think he said, for his parents out here at Sandy. And he spoke of going out to Umatilla County to work in the bean harvest. Then he finally landed in Spokane, where he remained, I think he said, maybe as much as a year or a year and a half. In any event, he didn't get back here in Portland so that the company had contact with him until September of 1956.

Now the company's position, as I understand it on this question of cooperation is that with this judgment having been taken against Pedro on July 30th, 1954, it had a year and only a year in which to move to set aside the judgment on the ground that it had not had an opportunity to defend the case; and that Pedro moving around as he did [62] and not keeping in touch with the company so that it could get him back here and enlist his cooperation in moving to set aside the judgment was in violation of the cooperation clause.

You see the spread in dates. The judgment was on July 30, 1954. He didn't get back here or, at least, the company didn't get in touch with him until nearly two years later, much longer than the year that the company had to move against the judgment.

I have some trouble in stating what I regard as the duty of the parties under that cooperation

clause. Pedro had been sued and, according to his story, he had mailed the papers in promptly to the company. Then he had to make a living, which he was having a hard time doing. He did the best he could. I think there are a number of factors you have to consider as to whether his conduct amounted to a violation of the cooperation clause. If it did amount to a violation of the cooperation clause, he can't recover in this case, even though you find he did forward the papers.

This plaintiff has two hurdles to get over. First, you must be satisfied that he forwarded the papers and, second, you must be satisfied as to this cooperation matter.

As to the cooperation matter, the defendant [63] company has the burden of proof. It has to satisfy you by a preponderance of the evidence as to that issue, that Pedro did not cooperate with it within the meaning of the policy from all the facts and circumstances here.

Now, there are quite a few facts and circumstances, it seems to me, that have a bearing on whether or not Pedro cooperated. Among the circumstances and problems, it seems to me, is his own good or bad faith. It seems to me the company's own diligence in the matter enters into it. There was some testimony here that his mother lived in the community. I don't know whether it is very clear. All those things enter into it.

I don't know that I can say anything more to you on that point. If he forwarded the letter and did not violate the cooperation clause, the plaintiff

is entitled to your verdict. If he did not forward the letter, the defendant is entitled to a verdict. Even though he forwarded the letter, if Pedro did not cooperate defendant is entitled to your verdict.

You will have two forms of verdict, one for the plaintiff and one for the defendant in the usual form. You will have the exhibits with you in the jury room. Give them the weight you think they are entitled to, along with the evidence you have heard from the witness stand.

The verdict must be unanimous. You will elect [64] a foreman who will sign your verdict after you have agreed upon it.

You have got some conflict here of fact, both direct and indirect. You are the exclusive judges of the fact questions in the case and of the weight and credibility of the witnesses. That is your function as jurors.

Any comment that I may have made here is not intended by me to indicate that I have any view that I am intending to pass on to you as to the proper solution of these fact questions.

I don't know that I used the phrase "change of address." That is the language of the policy on the front part of it. If it is true, as Counsel argued that that is one of the conditions of the policy that is one of the facts in the case, that the policy said it was important that he should keep the company advised of his change of address. Whether his failure to advise the company of a change of address under all the facts, circumstances and cond

tions amounted to failure to cooperate is for you to decide.

Swear the Bailiff.

(The Bailiff was sworn and the jury retired to consider of its verdict.)

The Court: State your objections to the instructions.

Mr. Wells: If your Honor please, I would like to take [65] one exception for the record to the Court's failure to instruct the jury, as requested in Plaintiff's Requested Instruction No. 5, to the effect that the jury should disregard the defendant's contention that Kenneth Pedro failed to keep it advised of his address for the reason that under the law and under all the evidence and circumstances of this case such failure would not relieve the defendant from liability.

The Court: You may have your exception. Exceptions for the defense?

Mr. Vergeer: I don't think we have any exceptions, your Honor. We are satisfied.

The Court: The exception stated by Mr. Wells has been duly considered and respectfully denied.

(Whereupon proceedings in the above cause were concluded.) [66]

[Endorsed]: Filed May 15, 1957.

[Endorsed]: No. 15553. United States Court of Appeals for the Ninth Circuit. Farmers' Mutual Insurance Co., Appellant, vs. John L. Roe, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 9, 1957.

Reporter's Transcript Filed: May 16, 1957.

Docketed: May 16, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15553

FARMERS' MUTUAL INSURANCE CO.,
Appellant.

vs.

JOHN L. ROE,
Appellee,

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now the above named Appellant, and
thereby designates to be included in the record to
be printed in this appeal the following matters:

1. Pre-trial order.
2. Complete Transcript of Testimony.
3. All Exhibits.
4. Verdict.
5. Complaint.
6. Judgment.
7. Order Denying Judgment & N.O.V.

Dated this 17th day of July, 1957.

VERGEER & SAMUELS,
/s/ By C. S. CROOKHAM,
Of Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 19, 1957. Paul P. O'Brien,
Clerk.

